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Devolution, Departures and Destinations: Reflections on the Railway Policing (Scotland) Act 2017

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A. INTRODUCTION

The Railway Policing (Scotland) Act 2017 (the “2017 Act”) confers railway policing powers on Police Scotland and the Scottish Police Authority (“SPA”), and removes functions in relation to those powers in Scotland from the British Transport Police Authority (“BTPA”) and British Transport Police (“BTP”) constables. Passed by a narrow majority in June 2017 with an agreed commencement (or “go-live”) date of April 2019, the 2017 Act marked the first step in the integration of BTP Scotland into Police Scotland, enabling the programme of work required to deliver full integration, including secondary legislation. The post-legislative programme has however been fraught with difficulty and the 2017 Act has not yet commenced, nor is it clear if it will be commenced. Citing public safety concerns, in February 2018 the then Justice Secretary, Michael Matheson, announced integration would be postponed and a detailed “re-planning” process undertaken to establish a new “go-live” date. Six months later, prompted by advice from Police Scotland, the new Justice Secretary, Humza Yousaf, announced that the Scottish Government would “re-examine all options” with a view to enacting the principles of the devolution of railway policing more quickly, while keeping full integration as the longer-term aim.¹ Set against this background, this note argues that the substantial risks and costs associated with full integration represent a material change of circumstances from the Railway Policing Bill as passed, and suggests the Scottish Government should look to repeal the 2017 Act, providing certainty for the officers and staff of BTP Scotland, as well as the wider BTP and BTPA. The note then sets out suggestions for a devolved railway policing model aimed at securing the main benefits of the 2017 Act (greater accountability and more effective railway policing), while taking account of the complex interdependencies that underpin railway policing in practice.

B. DEVOLUTION: THE 2017 ACT

The legislative roots of the 2017 Act lie in the Scotland Act 2016 which devolved railway policing to the Scottish Parliament, as part of a wider package of new powers agreed by the cross-party Smith Commission in the wake of the 2014 independence referendum. While the original Scottish Government proposal sought to fully integrate the BTP (and the Civil Nuclear Constabulary) into Police Scotland, the Smith Commission, in its final report, recommended only that “the functions of the British Transport Police in Scotland will be a devolved matter”, thereby leaving open a range of available policy options to the Scottish Government.²

The Scottish Government quickly settled on full integration of the BTP in Scotland into Police Scotland as its preferred policy option, rejecting alternative and less radical options put forward by the BTP and BTPA. The Scottish Government opened its plan to public consultation in June 2016 and, although the proposal drew strong criticism from staff organisations, the rail industry and individuals,³ proceeded to legislate for full integration later that year.

Published in December 2016, the Railway Policing Bill (the “Bill”) was underpinned by a number of key assumptions, notably that the transition costs would be “minor” and future running costs would not increase.⁴ The supporting memoranda to the Bill also identified scope for “significant efficiencies”,⁵ and a commitment to retain “exactly the same number and rank/grade of officer”, as well as to provide “affordable, sustainable and fair” pensions, as informed by ongoing engagement with officers and staff.⁶ It was further assumed that “more effective operational policing” would be secured by dint of full integration.⁷

The 2017 Act received Royal Assent in August 2017. Narrowly drafted, the legislative intent is to remove BTP and BTPA responsibilities in Scotland. The key sections – section 4 and section 5 – respectively state that the functions of the BTPA and BTP constables “are no longer exercisable in or as regards Scotland”. However, as noted above, the 2017 Act has not yet commenced and appears to be at a standstill. Risks and challenges to date include: escalating transition costs with dependency on consultants; widespread workforce opposition and the attendant risk that experienced BTP officers and staff will leave the organisation prior to integration; a lack of clarity across a range of key issues including railway policing agreements, terms and conditions and asset transfer; a pension liability in the region of £45 million to £100 million; and incompatibility in information and communications technology (“ICT”) between Police Scotland and the BTP.⁸

With the delivery programme now approaching its third year, it is reasonable to suggest that the key assumptions underpinning the legislative intent are flawed. Broadly, the problems are twofold. First, there is the inherent complexity of the policy objective; involving the partial extraction of a function from one organisation, its integration into another organisation, and the requirement to seamlessly reconnect the two.⁹ Second, there has been a failure to fully investigate this complexity, with a reliance on uncoded or untested assumptions, the decision not to develop a full business case, and a “culture of optimism” that prevented challenges and risks being fully addressed.¹⁰

C. DEPARTURE: THE CASE FOR REPEAL

At the time of writing, the Scottish Government is exploring alternative options to give more immediate effect to the Smith Commission recommendations. Full integration, however, remains the longer-term policy aim even while (confusingly) the policy itself is under review. This longer-term commitment has several effects. First, it precludes any certainty for BTP officers (serving and retired) and staff. The protracted integration process to date, and the inherent uncertainty for officers and staff, has hastened or prompted significant life and career decisions such as relocation or early retirement. We would suggest that the Scottish Government needs to take a stronger ethical position, and consider whether leaving full integration as a policy option, however unlikely it may currently be, is reasonable or fair. Second, the commitment to full integration, with no practical timescale, merely postpones rather than resolves the existing risks and liabilities. While some issues such as ICT could be incorporated into the ongoing Police Scotland reform programme, this will not fully alleviate the costs. Other longer-term risks and costs, including pension liabilities are likely to remain, while full integration at any point in time is likely to incur significant costs. Third, the longer-term commitment muddies the immediate undertaking to examine alternative devolution options, which may involve primary legislation. It is also unclear how this sits with the parallel commitments to keep full integration under review and explore other devolution models.

Set against a complex backdrop of risks and challenges, along with tangible effects on BTP Scotland officers and staff,¹¹ we argue there is a strong case for repealing the 2017 Act. In the first instance, it is clear that the current position represents a significant and material change in circumstances from the Bill as it was passed, and that the longer-term aim of full integration is not feasible without incurring significant costs. In other words, the current position no longer reflects the “will of Parliament”. From a moral standpoint, for as long as the 2017 Act remains on the statute books, there can be no certainty of circumstances for BTP officers and staff in Scotland. Nor does the 2017 Act account for damage to the remaining BTP (and by extension, to the future of railway policing in Scotland). On this point, we would argue the strength of railway policing in Britain lies in the network-wide jurisdiction which cuts across legal systems and police force boundaries, facilitates consistent policing standards across the network, and provides a single point of contact in response to external demands.¹² As such, it follows that any territorial loss is likely to weaken the existing service.¹³

Looking ahead, we suggest that the policy emphasis should be on effective devolution, which means strengthening accountability for railway policing and increasing operational effectiveness, as per the original expected benefits, recognising the complex cross-border interdependencies associated with railway policing, and, crucially, conceding the risks and costs associated with full integration.

To this end, the remainder of this note proposes a Scottish governance model (“Scottish Governance Model”) for railway policing. The measures in the model are not exhaustive, and are intended to provide ideas as to what effective devolution might look like, drawing on the accountability and scrutiny arrangements in the Police and Fire Reform (Scotland) Act 2012 (“2012 Act”), current BTP, BTPA and Police Scotland planning and reporting arrangements, and measures proposed by the BTP and BTPA in 2015.¹⁴ The model also retains the railway policing management forum (“Railway Policing Management Forum”) as legislated for in the 2017 Act, which is designed to allow engagement between the SPA and the rail industry and rail unions, as well as the requirement for the SPA to put in place arrangements to seek the views of a range of stakeholders, including passengers and rail industry staff.¹⁵ Note also that some accountability mechanisms for railway policing in Scotland are already in place; for instance BTP officers may be investigated by the Police Investigations and Review Commissioner (“PIRC”) and inspected by Her Majesty’s Inspectorate of Constabulary in Scotland (“HMICS”), while the decision to roll out taser for BTP Scotland was made in discussion with Police Scotland and approved by Scottish Ministers.

D. DESTINATIONS: A SCOTTISH GOVERNANCE MODEL FOR RAILWAY POLICING

The Scottish Governance Model aims to strengthen the accountability of railway policing in Scotland and cement the existing partnership between the BTP and Police Scotland, while benefitting from railway policing expertise at a governance and operational level. This is consistent with the principles underpinning the 2013 Memorandum of Understanding on devolution between the UK Government and the devolved administrations which, in recognising “the importance of co-operation across a range of areas”, states that it may be appropriate for them to “undertake activities on each other’s behalf, which may be covered in agency arrangements or other agreements”.¹⁶

In terms of overarching principles and direction, we suggest that the BTPA Chair is made accountable to Scottish Ministers for railway policing in Scotland (thereby mirroring the relationship between the SPA Chair and Ministers). Proceeding from the understanding that railway policing in Scotland should be underpinned by principles and values set by the Scottish Government, we further suggest the following measures, either on an administrative or a statutory footing:

a)

The BTP Chief Constable should ensure railway policing in Scotland is consistent with the Policing Principles under section 32 of the 2012 Act¹⁷ and the strategic policing priorities set by Scottish Ministers under section 33.¹⁸

b)

A joint BTPA-SPA Railway Policing Committee (“Joint Committee”) (alternately chaired) should set the strategic direction for railway policing in Scotland, provide scrutiny and oversight, publish information on the exercise of railway policing in Scotland (for example, performance reports, statistics, and expenditure). The Joint Committee should also be involved in the appointment of the BTP Scotland Divisional Commander, and agree workplans for HMICS inspections.

c)

The BTPA Strategic Police Plan (“Plan”) should set out the main strategic objectives for railway policing in Scotland (in a separate chapter) and where possible, the related outcomes and performance measures (mirroring section 34 of the 2012 Act). The Plan would be developed by the Joint Committee,

with the involvement of the respective Chief Constables and in consultation with the Railway Policing Management Forum and railway stakeholders.

d)

The BTP Annual Plan should set out objectives and measures for Scotland that are consistent with Scotland's strategic policing priorities. These would be developed in consultation with the Joint Committee and subject to consultation and engagement with the Railway Policing Management Forum.

e)

The Joint Committee should assess BTP's performance in delivering the Annual Police Plan for Scotland (mirroring section 39 of the 2012 Act). To achieve this, the BTP Chief Constable should submit a report to the Joint Committee within three months of the financial year-end setting out his or her assessment of performance in relation to the Annual Plan for Scotland, as well as an assessment of delivery against the BTPA Strategic Plan for Scotland. A copy of the BTP Annual Plan would be published and laid before the Scottish Parliament.

f)

The BTP and Police Scotland Chief Constables should meet on a quarterly basis to review operational policing, partnership working and medium to longer-term strategic priorities.

g)

The BTP Chief Constable should attend SPA Board meetings on a quarterly basis to report on performance in Scotland and on partnership working, with Police Scotland.

h)

A designated SPA Board member should sit on the BTPA Finance Committee to provide oversight of the budget for Scotland and represent Scottish interests. The BTPA would also provide a statement of accounts to the Auditor General for Scotland.

Finally, with a view to providing clarity on the devolved arrangements, we suggest that the Joint Committee should publish a governance and accountability framework that details how railway policing in Scotland is made accountable to the Scottish Government, the Scottish Parliament and Scotland's rail stakeholders, and sets out the relationship with the Crown Office and Procurator Fiscal Service, and key scrutiny and oversight bodies such as HMICS and PIRC.

E. CONCLUSION

Retaining a single Great Britain-wide specialist railway police service, nested within a new devolved governance and accountability structure, effectively delivers the principles of the Smith Commission recommendations whilst maintaining public safety, reducing costs, and minimising risks. From an operational perspective, more effective policing can be achieved through closer collaboration between the two forces, with new lines of accountability making BTP Scotland responsive to Scottish direction and oversight. This would allow railway policing in Scotland to be underpinned by values and principles set by the Scottish Government, and to build on the respective operational strengths of the BTP and Police Scotland. The approach would also facilitate greater engagement with Scotland's railway communities and make collaborative working between the BTP and Police Scotland more transparent. Crucially, retaining the existing force structure removes the main challenges and risks identified to date, and would significantly reduce the future burden of risks, liabilities and responsibilities on both Police Scotland and the SPA. The existing force structure, within a new Scottish Governance Model, would also remove the need to replicate complex arrangements such as the

charging model and pensions, and resolve ongoing workforce issues, including the possible loss of experienced officers and staff. Arriving at this destination may require the expenditure of some political capital, and whilst this may carry some short-term consequence, the longer-term benefits for the police, politicians and, crucially, the travelling public are likely to be significant.

Notes

1 As per the Scottish Government's announcement on 27 September 2018, available at <https://news.gov.scot/news/railway-policing>.

2 Smith Commission, Report of the Smith Commission for Further Devolution of Powers to the Scottish Parliament (2014) para 67.

3 L Nicholson, Consultation on the Integration of the British Transport Police in Scotland into Police Scotland: An Analysis of Responses (2016), available at <https://consult.gov.scot/police-division/transport-police/results/consultation-on-the-integration-of-the-british-transport-police-in-scotland-into-police-scotland-an-analysis-of-responses.pdf>.

4 Scottish Government, Financial Memorandum on the Railway Policing (Scotland) Bill (8 December 2016) paras 5 and 20.

5 Ibid para 33.

6 Ibid paras 60–61.

7 Ibid paras 44–48.

8 For discussion, see K Murray and C Atkinson, “The BTP Leaving Home Project: The impact of the transfer of BTP D Division into Police Scotland on officers and staff” SCCJR Briefing (2/2018), available at <http://www.sccjr.ac.uk/wp-content/uploads/2018/02/BTP-Leaving-Home-SCCJR-Briefing-21-Feb-2018-Murray-and-Atkinson-.pdf>.

9 HM Inspectorate of Constabulary in Scotland, Strategic overview of BTP in Scotland including the proposed transfer to Police Scotland (2017), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/661813/hmics-strategic-overview-btp-scotland.pdf.

10 Ibid para 76.

11 Murray and Atkinson (n 8).

12 K Murray and C Atkinson, “This service terminates here? Politics, practitioner perspectives, and the future of railway policing in Scotland” (2018) Policing: A Journal of Policy and Practice (forthcoming).

13 HMICS (n 9) 21.

14 BTP/BTPA, “Options for the devolution of transport policing in Scotland” (9 January 2015), available at <http://www.btp.police.uk/pdf/BTP-Scottish%20Options%20Paper%2017-4-2015-Appendix.pdf>.

15 2017 Act ss 85J–85L.

16 Memorandum of Understanding and Supplementary Agreements Between the United Kingdom Government and the Scottish Government, the Welsh Government and the Northern Ireland Executive Committee (October 2013) paras 8–9, available at <https://beta.gov.scot/binaries/content/documents/govscot/publications/agreement/2013/10/devolution-mou/documents/2f5a6984-a146-48df-b206-877086b7150b/2f5a6984-a146-48df-b206-877086b7150b/govscot:document/>.

17 The 2012 Act states that the main purpose of policing is to improve the safety and wellbeing of persons, localities and communities in Scotland. The Police Service, working in collaboration with others where appropriate, should seek to achieve that main purpose by policing in a way which (i) is accessible to, and engaged with, local communities, and (ii) promotes measures to prevent crime, harm and disorder.

18 These define the contribution of policing to the following of the Scottish Government's purpose and national outcomes: localism, inclusion, prevention, response, collaborative working, accountability, and adaptability.